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tiff was principal, it would have refused to make the sale. *Held*, not a defense to an action by principal for breach of an implied warranty. *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, (N. Y. 1914) 105 N. E. 88.

Where the agent, as ostensible principal, makes a contract, not under seal, in his own name, the real principal may sue thereon. *Winchester v. Howard*, 97 Mass. 303; *Darling v. Noyes*, 32 Iowa 96; *Henderson, Hull & Co. v. McNally*, 168 N. Y. 646. There are certain exceptions to this rule, however; (first) where exclusive credit is given to the agent, *Cowan v. Curran*, 216 Ill. 598; *Kelly v. Thuey*, 102 Mo. 522; but the making of an ordinary business contract, without in some way indicating that the personality of the other party is regarded as material, implies consent that it may be enforced by a third person, if it was made in his behalf, *Hawkins v. Windhorst*, 87 Kans. 176, 123 Pac. 761; (secondly) where there is an executory contract, the third party, on discovering who the real principal is, may repudiate the contract, and does not have to submit his reasons to the court for so doing, this on the grounds of the established rule in contracts, that a party has a right to select and determine with whom he will contract, and cannot have another thrust upon him without his consent, *Boston Ice Co. v. Potter*, 123 Mass. 28; *Winchester v. Howard*, 97 Mass. 303; *Arkansas Smelting Co. v. Belden Co.*, 127 U. S. 379. The defendant in the principal case set this up as a defense to a contract which had been fully executed but no cases can be found in support of its theory, except where the contract was vitiated on account of the fraud of the agent.

SALES—TENDER OF DELIVERY.—Plaintiff contracted to sell defendant 25 tons aluminum to be delivered f. o. b. New York, "shipment as specified by the buyers between October, 1910, and April, 1911." Defendant accepted 13 tons but did not call for further deliveries nor request further shipments. Plaintiff, without tendering further deliveries, brought suit, alleging only readiness and willingness to perform. *Held*, that plaintiff was bound to tender delivery as a condition precedent to his right to recover for breach of contract. *British Aluminium Co. v. Trefts* (1914), 148 N. Y. Supp. 144.

Where there are no conditions precedent to be performed by the vendee, and the acts are concurrent, the vendor cannot recover for breach without first tendering delivery, unless tender has been waived by agreement. *Lester v. Jewett*, 11 N. Y. 453; *Gross v. Ajello*, 116 N. Y. Supp. 380; *Hapgood v. Shaw*, 105 Mass. 276; *Blackman v. Hoey*, 18 La. Ann. 23; *Dryden v. Lewis*, 5 Dana (Ky.) 138. The cases cited by the court in support of its decision *Lester v. Jewett*, *supra*; *Delaware Trust Co. v. Calm*, 195 N. Y. 231; *Gross v. Ajello*, *supra*; *Hendrickson v. Callam*, 131 N. Y. Supp. 839; and *Pease Oil Co. v. Munroe Co. Oil Co.*, 138 N. Y. Supp. 177, were all such cases. But in the present case there was something to be done by the vendee, namely, giving shipping instructions, which was a condition precedent. *Bell v. Hatfield*, 121 Ky. 560, and 2 L. R. A. (N. S.) 529 (Note). WILLISTON, SALES, § 448; BENJAMIN, SALES, § 1018. The following cases hold that where the vendee is to give shipping instructions; name the place of shipment, or time of delivery; or directions or specifications as to the manufacture of the

goods, and fails to do so, the vendor may bring an action for breach without alleging or proving tender, but by merely alleging and proving readiness and willingness to perform: *West v. Emmons*, 5 Johns. (N. Y.) 179; *Hunter v. Wetsell*, 84 N. Y. 549; *Lekas v. Schwartz*, 107 N. Y. Supp. 145; *Colvin v. Weedman*, 50 Ill. 311; *L. N. A. & C. Ry. Co. v. Iron Co.*, 126 Ill. 294; *Weill v. American Metal Co.*, 182 Ill. 128; *Lucas v. Nichols*, 5 Gray 309; *Weymouth v. Goodwin*, 105 Me. 510; *Florence Wagon Works v. Kalamazoo Co.*, 144 Ala. 598; *Posey v. Scales*, 55 Ind. 282; *Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U. S. 264; *Bell v. Hatfield*, 121 Ky. 560. But see *Blish Milling Co. v. Ditherage*, 155 Ky. 319, contra.

WILLS—BURDEN OF PROOF AS TO DUE EXECUTION.—In an action to resist the probate of a will, brought under § 3154 of the Indiana Code, an instruction placing the burden of proof of due execution and testamentary capacity on the proponents was held to be correct. (Cox, C. J. and ERWIN, J. dissenting. *Herring v. Watson* (Ind., 1914), 105 N. E. 900.

The prevailing opinion is based upon the decision of the Indiana Court in the case of *Steinkuehler v. Wempner*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673, and the case of *McReynolds v. Smith*, 172 Ind. 336, 86 N. E. 1009. These cases are, however, not authority for the decision in the principal case because they were cases arising on objections filed in the Probate Court under § 3153 of the Code. The Supreme Court of Indiana has held that in a proceeding under § 3154, such as in the principal case, which section provides for the filing of a petition in the Circuit Court to either resist or set aside probate, it is immaterial, so far as procedure is concerned, whether the will has been admitted to probate or not. *Curry v. Brateny*, 29 Ind. 195. If the decision in the latter case is correct, the conclusion in the principal case is incorrect in not drawing the distinction between actions under the different sections of the Code, and in relying on cases which were decided under a different section. The cases relied upon expressly recognize the rule that after probate the burden is on the contestant, and this has clearly been the Indiana doctrine for a great number of years supported by the following authorities: *Moore v. Allen*, 5 Ind. 521; *Turner v. Cook*, 36 Ind. 129; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271. And this seems to be the correct rule. See WIGMORE, EVIDENCE, §§ 2500, 2502, and cases there cited.

WILLS—CONSTRUCTION—ILLEGITIMATE CHILDREN.—Testator devised property to trustees with directions to divide into four equal portions and pay one-fourth of the total income to each of his four children, two of whom were daughters, during their lives, at the death of any of them, whether before or after the death of the testator "to pay to each of the children of such deceased daughter an equal portion of her share, discharged of said trust; the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive." One daughter died leaving a legitimate daughter and also an illegitimate son of an illegitimate daugh-